UNNAMED PLAINTIFFS IN FEDERAL CLASS ACTIONS: ZAHN V. INTERNATIONAL PAPER CO. FURTHER RESTRICTS THE AVAILABILITY OF THE CLASS SUIT

I. INTRODUCTION

In 1969 the United States Supreme Court in *Snyder v. Harris*[1] severely limited the availability of class actions in federal courts for cases in which jurisdiction is based on diversity of citizenship.[2] The Court held that members of a rule 23(b)(3)[3] class may not aggregate their claims to satisfy the statutory requirement that the matter in controversy exceed $10,000.[4] In late 1973 the Court went even further, holding in *Zahn v. International Paper Co.*[5] that *each* member of the class—named or unnamed—in a diversity action must satisfy the jurisdictional amount to confer subject matter jurisdiction upon the court. These decisions have rendered it virtually impossible to bring a class action in federal court when a minimum amount in controversy is required as a jurisdictional predicate. It is the purpose of this note to demonstrate that the decisions were not compelled by precedent or analysis and that the Court could have reached the opposite results on sound legal grounds. Such results would have given effect to the goals of the class action device and to the purpose of the 1966 revisions of rule 23. To develop this thesis, the note will explore the historical bases of the aggregation rule and then discuss and analyze the rationale of the two principal Supreme Court cases which articulate the rule as applied to class action suits. After that the focus will shift, and the note will consider the negative impact of the present standard on various types of litigation. The note concludes that the present application of the rule was not compelled or supported by precedent and suggests that legislative action be taken to alleviate the problems which will arise.

II. THE HISTORICAL BASIS OF THE AGGREGATION OF CLAIMS RULE IN CLASS ACTIONS

A. *The Basic Aggregation Rule*

A federal district court has subject matter jurisdiction over a diversity

[1] 394 U.S. 332 (1969).

[2] 28 U.S.C. § 1332(a) (1970).

[3] Rule 23(b)(3) authorizes the use of a class action when the common questions of law or fact predominate over matters peculiar to the individual members and when a class action is determined by the court to be the best available method to fairly and efficiently adjudicate the controversy.

[4] 394 U.S. 332 (1969).

[5] 94 S. Ct. 505 (1973).

of citizenship case[6] or a general federal question case[7] only if "the matter in controversy exceeds the sum or value of $10,000 . . . ." Class action and joinder devices, permitted in appropriate cases by rules 23 and 20, respectively, allow multiple parties, often with multiple claims, to sue or be sued in a single action. If each party satisfies the minimum amount in controversy or if jurisdiction is invoked under a statute not requiring a minimum amount, the court may proceed to determine whether a class action or joinder is appropriate. However, if some or all of the parties do not satisfy the jurisdictional requirement, the question becomes whether the statute can be satisfied by aggregating the claims of all the parties.

There is no dispute as to the basic scope of the aggregation rule,[8] and the rule is easily stated. The jurisdictional amount in controversy requirement will be satisfied by aggregating claims of multiple plaintiffs if the claimants have a common and undivided interest in the action; however, it will not be met by aggregating separate and distinct claims.[9] In other words, aggregation is permitted in compulsory joinder cases where the rights asserted are joint, but not in cases of permissive joinder where such rights are several. Despite the general agreement as to the basic principle involved, no criteria have been developed to allow prediction of the outcome of certain types of cases. The permissibility of aggregation can be easily determined once the character of the rights involved in the litigation has been determined. However, serious problems have arisen in trying to ascertain whether the rights sought to be enforced are joint or several.

This difficulty can be illustrated by a brief comparison of two cases which reached opposite results on almost identical facts. In *Russell v. Stansell*,[10] several taxpayers representing a class consisting of all taxpayers within an assessment district sought to enjoin collection of an assessment.

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[6] 28 U.S.C. § 1332 (1970).

[7] 28 U.S.C. § 1331 (1970).

[8] This rule has come from three joinder cases, Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832); Troy Bank v. G. A. Whitehead & Co., 222 U.S. 39 (1911); and Pinel v. Pinel, 240 U.S. 594 (1916).

[9] Aggregation was permitted where the holders of two notes, secured by a single vendor's lien, sued to assert the lien, Troy Bank v. G. A. Whitehead & Co., 222 U.S. 39 (1911); where creditors sued to collect fire insurance payable to their debtor, Phoenix Ins. Co. v. Woosley, 287 F.2d 531 (10th Cir. 1961); and in a suit to require that a fund be created for the benefit of a class, Berman v. Narragansett Racing Ass'n, Inc., 414 F.2d 311 (1st Cir. 1969). Aggregation was not permitted where several landowners sued to enjoin an assessment for street improvements, Wheless v. City of St. Louis, 180 U.S. 379 (1901); and where several policyholders of an insurance company sought a declaration of their rights under their policies, Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

[10] 105 U.S. 303 (1881).

The total amount in question was well over the required jurisdictional amount, but none of the plaintiffs individually could have been liable for an assessment amount equal to the jurisdictional minimum. The Supreme Court held that the rights asserted by the plaintiffs were separate and distinct and therefore could not be aggregated to satisfy the jurisdictional amount. However, in a later case with similar facts, the Court permitted aggregation. In *Brown v. Trousdale*,[11] a group of taxpayers of a county in Kentucky sought, on behalf of themselves and all others similarly situated, to enjoin collection of a tax and to prohibit future levies. The argument that such multiple claims were separate and distinct because of the potential individual liability of each claimant was rejected, and the Court held that the jurisdictional requirement had been satisfied because "[t]he amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction . . . ."[12]

These cases are typical of the inconsistent applications of the aggregation rule. Both *Russell* and *Brown* were cases in which injunctive relief was sought, and the plaintiffs in each had a distinct liability at stake. Nevertheless, aggregation was permitted in one but not the other. Neither Court disputed the general aggregation rule, but each reached a different conclusion as to whether the rights sought to be enforced were joint or several. *Russell* viewed each claim as a separate controversy, while *Brown* regarded the controversy as encompassing the claims of all the plaintiffs.

B. *Aggregation and Rule 23*

When the Federal Rules of Civil Procedure were adopted in 1938, rule 23 was intended to be a restatement of the law of class actions as it then existed.[13] The rule extended the use of the class action device to all civil actions and authorized representatives of a class to sue or be sued in federal court when the character of the rights sought to be enforced was

> (1) joint, or common, or secondary . . . ; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.[14]

These enumerated types of class actions came to be known as "true,"

[11] 138 U.S. 389 (1891).

[12] *Id.* at 394.

[13] ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT 58 (1937).

[14] FED. R. CIV. P. 23.

"hybrid," and "spurious," respectively.[15] When an action was brought as a class suit, the courts tended to be more concerned with deciding which of these categories described the action than with confronting the more basic question of whether class action treatment was appropriate on the facts involved. Once the designation was affixed, various consequences, such as the permissibility of aggregation of claims, the effect of the statute of limitations on the absent members of the class, the possibility of intervention, and the binding effect of the judgment, flowed from that determination.[16]

Prior to 1966, the general aggregation rule under rule 23 was that claims could be aggregated in a true class action but not in a hybrid or spurious class action.[17] But the original rule 23 did not resolve the difficulties experienced by courts in applying the aggregation rule. The categorization of a class action as true, hybrid, or spurious depended on categorization of the rights sought to be enforced as joint-common or several. These terms "proved obscure and uncertain,"[18] and courts continued to have difficulty applying them to concrete cases.[19]

III. AGGREGATION OF CLAIMS: SNYDER V. HARRIS

Rule 23 was completely rewritten when the Federal Rules of Civil Procedure were revised in 1966.[20] The amended rule eliminated the

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[15] 3B J. MOORE, FEDERAL PRACTICE ¶ 23.30 (1969).

[16] *See* Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 A.B.A. ANTITRUST L.J. 254 (1966); Developments, *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958); *see* note 9 *supra*.

[17] *E.g.*, Brotherhood of R. R. Trainmen v. Templeton, 181 F.2d 527 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950) (aggregation allowed); Matlaw Corp. v. War Damage Corp., 164 F.2d 281 (7th Cir.), *cert. denied*, 333 U.S. 863 (1947) (aggregation not allowed). *See generally* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1756 (1972).

[18] 39 F.R.D. 69, 98 (1966).

[19] *See, e.g.*, Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa. 1939), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F. Supp. 592 (E.D. Pa. 1941), *rev'd sub nom.* Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3d Cir. 1941).

[20] 383 U.S. 1031 (1966). The text of the new rule 23, FED. R. CIV. P. 23, is as follows:

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to indi-

joint-several rights distinction as well as the necessity to "pigeonhole" the action into one of the three categories. The rule established practical guidelines and gave the district judge substantial discretion in determining whether class action treatment was desirable. In addition, the anomaly of a spurious class action, which was not really a class action at all because it did not adjudicate the rights of anyone not before the court, was eliminated. Furthermore, the amended rule provided that under subsection (b)(3) all the non-appearing members of the class were to be included in the judgment unless they took affirmative steps to exclude

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vidual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in

themselves.[21] Elimination of the joint-several terminology, which was the basis of the aggregation decisions, suggested that the amendment might have also changed the applicability of the aggregation doctrine in class actions. But conflicting decisions by courts of appeals after the adoption of the amended rule indicated that the courts were unable to determine the exact effect.

In *Alvarez v. Pan American Life Insurance Co.*,[22] a diversity action brought under new rule 23(b)(3), the plaintiff sought a declaratory judgment of rights under insurance contracts on behalf of himself and others similarly situated (Cuban nationals holding life insurance contracts with the defendant). Although the aggregate claims of all the members of the class would have exceeded the jurisdictional requirement, the plaintiff's individual claim or stake in the matter did not. The Fifth Circuit refused to permit aggregation and found that the amount in controversy did not exceed $10,000. The court reasoned that amended rule 23 could not abandon the traditional "separate and distinct claims" doctrine without violating rule 82,[23] which provides that the rules cannot extend or limit the jurisdiction of the district courts.

However, in *Gas Service Co. v. Coburn*,[24] also a rule 23(b)(3) diversity action, the Tenth Circuit disagreed with the *Alvarez* decision. Plaintiff, a customer of the gas company, brought a class action on behalf of himself and all other customers similarly situated. The individual claim of the named plaintiff amounted to $7.81, but the total claims of all members of the class exceeded $10,000. The court acknowledged that the claims were separate and distinct and that aggregation would not have been permitted had the action been brought under the old rule 23. However, the court permitted aggregation and decided that the amount in controversy exceeded $10,000. The court reasoned that the

such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class as the court directs.

[21] FED. R. CIV. P. 23(c)(3). This right to "opt out" of the class applies only to 23(b)(3) class actions.

[22] 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

[23] FED. R. CIV. P. 82.

[24] 389 F.2d 831 (10th Cir. 1968), *rev'd sub nom.* Snyder v. Harris, 394 U.S. 332 (1969).

purpose of rule 23, as amended, was to eliminate the "character of the rights" classification and concluded that the amount in controversy should now be determined by the total amount of all claims to be adjudicated in a class action. The court stated:

> These terms [joint, common, etc.] were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard[25]

Faced with the same issue, the Eighth Circuit in *Snyder v. Harris*[26] followed the *Alvarez* decision and denied aggregation in a rule 23 (b) (3) class action in which jurisdiction was predicated on diversity of citizenship. In *Snyder*, the named plaintiff, a shareholder in an insurance company, brought suit on behalf of herself and a class of shareholders against members of the board of directors of the company. The named plaintiff alleged damages to herself of only $8,740, but the total claims against the defendant by members of the class amounted to approximately $1,200,000. The Supreme Court granted certiorari in order to resolve the conflict between the circuits.[27] In affirming *Snyder* and reversing *Gas Service Co.*, the Court held that the interpretation of "matter in controversy" had not been changed by the revision of rule 23.[28] Justice Black, writing for the majority, first referred to the "traditional judicial interpretation" of the jurisdictional statutes, that is, separate and distinct claims cannot be aggregated to satisfy the minimum dollar requirement. Noting that this interpretation was based on a statutory construction of the phrase "matter in controversy" and not on old rule 23, he stated that the revision should have no effect on the interpretation.[29] Further, he reasoned, if the amended rule did purport to change the aggregation rules it would violate rule 82.[30]

In *Snyder* the representative plaintiffs had urged that the amount in controversy should be measured by the aggregate of the claims of the entire class on the ground that the judgment in the class action would include all the members, whether or not before the court, except those who asked to be excluded. The Court rejected this argument, noting that the judgment in a permissive joinder case was also binding on all

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[25] 389 F.2d at 834.

[26] 390 F.2d 204 (8th Cir. 1968), *aff'd*, 394 U.S. 332 (1969).

[27] 393 U.S. 911 (1968).

[28] Snyder v. Harris, 394 U.S. 332 (1969).

[29] *Id.* at 336.

[30] *Id.* at 337.

parties and that the traditional aggregation doctrine had been first articulated in joinder cases.[31] Furthermore, the Court declined an invitation to re-evaluate its earlier construction of "matter in controversy," reasoning that it was precluded from doing so because Congress had on several occasions re-enacted the jurisdictional statutes to change the minimum amount required and on each occasion had left the "matter in controversy" language unchanged. The majority thought that Congress must have implicitly relied upon the Court's historically consistent construction of these statutes in setting the jurisdictional amount and concluded that construction had become tantamount to a legislative enactment rather than a judge-made rule.[32] In response to the argument that the joint-several terminology had resulted in needless litigation and uncertainty, the majority noted simply that the lower courts had developed "largely workable standards" for determining whether claims were joint (aggregable) or several (not aggregable).[33]

The Court's decision in *Snyder v. Harris* has been widely criticized by commentators.[34] The reasoning of the opinion is less than compelling, and many critics have complained that the decision undermines much of what the drafters of the revised rule tried to accomplish. The following discussion will identify the analytical infirmities of the opinion.

Justice Black believed that the legislature had implicitly ratified the judicial construction of "matter in controversy," which prohibited aggregation of separate and distinct claims. If Congress had in fact done so, then the suggested effect of amended rule 23 (allowing aggregation in all class actions) would indeed expand the jurisdiction of federal courts in violation of rule 82. In effect, the diversity statute would be read to state that federal courts do not have diversity jurisdiction over a group of separate and distinct claims, each of which is for $10,000 or less, and this could not be changed by the rule. But this argument stands or falls with the initial assumption of implicit legislative approval.

There is no authoritative support for the position that Congress implicitly considered and adopted the Court's statutory construction when

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[31] *Id.* at 337.

[32] *Id.* at 338-39.

[33] *Id.* at 341.

[34] *See, e.g.*, 7, 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1756, 1782 (1972); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969); Kaplan, *A Prefatory Note to the Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969), Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L REV. 1085 (1970); Note, *Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L. J. 1577 (1970).

it re-enacted the jurisdictional statutes.[35] The *Snyder* Court presumed adoption from silence, but it is equally possible that Congress, by its silence, specifically intended to refrain from adopting the Court's construction. In his dissenting opinion Justice Fortas noted that the Court was departing from its earlier position concerning congressional silence. Quoting from an earlier Supreme Court opinion,[36] he noted:

> It would require *very persuasive circumstances* enveloping Congressional silence to debar this Court from reexamining its own doctrines. It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law . . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.[37]

The majority in *Snyder* conceded the hazards of presuming adoption by congressional silence, and it is questionable whether any "very persuasive circumstances" were present in *Snyder*. In fact, the uncertainties and difficulties courts have had working with the terms "joint and common" and "separate and distinct" suggest that Congress would not want to adopt an interpretation which had proven so difficult to administer.

Commentators have called upon the Court to redefine "matter in controversy" in a way that would be appropriate to the present day context of class actions.[38] It is possible, though, that the traditional interpretation is flexible enough to permit aggregation of claims in properly brought class actions. In *Snyder* the Court indicated that the judicial interpretation of "matter in controversy" has been consistent at least since the decision in *Oliver v. Alexander*[39] in 1832.[40] *Oliver* involved claims for wages by a number of seamen against the assets of the ship owner. None of the individual claims exceeded the required jurisdictional amount, and the Court refused to aggregate the claims to satisfy the requirement because each seaman had an independent contract with the ship owner, making his claim separate and distinct. The Court stated:

> Each is to stand or fall by the merits of his own claim and is unaffected by those of his co-libellants. The defence which is good against one seaman, may be wholly inapplicable to another. One may have been paid; another may not have performed the service; and another may have forfeited in whole or in part his claim to wages.[41]

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[35] *See* H.R. REP. NO. 1706, 85th Cong., 2d Sess. (1958); S. REP. NO. 1830, 85th Cong., 2d Sess. (1958).

[36] Girouard v. United States, 328 U.S. 61, 69-70 (1946).

[37] 394 U.S. at 348 (emphasis added).

[38] *See* note 34 *supra.*

[39] 31 U.S. (6 Pet.) 143 (1832).

[40] 394 U.S. at 339.

[41] 31 U.S. (6 Pet.) at 146.

The Court apparently felt that it was improper to treat all the claims as a whole for jurisdictional purposes when each claim would probably require individual attention to resolve the issues peculiar to it. Questions affecting only individual claimants seem to have outweighed any questions common to all the seamen, and for that reason the court refused to permit aggregation. But this same issue can be resolved today without even reaching the problem of aggregation, since under amended rule 23(b)(3) an action can be brought as a class action only if, *inter alia*, "questions of law or fact common to members of the class predominate over any questions affecting only individual members . . . ."[42] Since aggregation cases subsequent to *Oliver* also emphasized the issue of separate and distinct claims,[43] none of these cases should be regarded as controlling precedent for a rule 23(b)(3) class action where common issues must predominate over individual issues.

In diversity of citizenship cases (and, by extension, possibly in general federal question cases) *Snyder* has frustrated the intent of amended rule 23 to approach the class action question on a more practical, functional basis. As noted by the Advisory Committee, the intent was to eliminate the necessity of determining the ambiguous "nature of the rights sought to be enforced." Class action treatment is now permitted if practical considerations indicate that it is the most desirable way of adjudicating the dispute.[44]

As a consequence of *Snyder*, in cases where the jurisdictional minimum is applicable, in addition to determining whether class action treatment is appropriate under rule 23, the district judge must still determine whether the rights asserted are joint or several. The majority in *Snyder* offered no guidance to lower courts in identifying the "largely workable standards" to which it refers, and thus a problem which the new rule was intended to eliminate will persist.[45]

Under old rule 23, the judgment in a spurious class action would have bound only those persons who affirmatively took part in the suit. The two actions involved in *Snyder*, however, were brought under the amended rule. Unlike the old rule, amended rule 23 provides that

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[42] FED. R. CIV. P. 23(b)(3).

[43] *See* cases cited Snyder v. Harris, 394 U.S. 332, 336.

[44] The court must find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). The rule lists factors to be considered in this determination.

[45] Courts had difficulty in determining the character of the rights asserted in a class action before *Snyder*. *See* text accompanying notes 10-12 *supra*. The majority opinion in *Snyder* did not resolve the difficulty. Therefore, it is not anticipated that the lower courts will be any better able to make this determination after *Snyder*.

the judgment in a (b)(3) action will bind all members of the class to whom notice was directed and who have not requested exclusion from the class.[46] The Court in *Snyder* noted that the binding effect of a (b)(3) class action is similar to that of a proceeding where parties have been permissively joined.[47] It said this similarity precludes aggregation in a (b)(3) class action, since permissively joined claims may not be aggregated. However, the Court's analysis fails to recognize the distinction suggested by the change in the provisions of rule 23. While permissive joinder and class actions have similar *res judicata* effects, they are essentially different in nature. Rule 20 permits individuals in certain circumstances to join in a single action, but they remain individual plaintiffs and judgment will be rendered for or against each individually. Rule 23(b)(3), on the other hand, treats a class of individuals as a unit and requires members to take affirmative action to remove themselves from the class if they do not wish to be included in and bound by the judgment. Judgment is rendered for or against the class as a whole, and damages are distributed by the court, after payment of appropriate costs and fees.

Therefore, in an action on behalf of a class of plaintiffs, even though each might have a specific monetary stake in the dispute, it would be appropriate to measure the amount in controversy by the size of the judgment that could be obtained against the defendant if the plaintiff class prevails. Such an interpretation of the statutory language would be compatible with the new procedural context and would not be a roadblock to implementation of the procedures available under amended rule 23. In *Snyder*, for example, the class of shareholders sought a judgment amounting to over $1,000,000. Holding that this amount satisfies the jurisdictional requirement would not be inconsistent with the supposed legislative intent in establishing an amount in controversy requirement to keep trivial diversity cases out of the federal courts. Aggregation *is* permissible in situations involving a single plaintiff who has two or more separate and distinct claims against the same defendant.[48] It would seem to require less stretching of the "matter in controversy" language to allow aggregation in a class action, where the claims of all the plaintiffs are similar, than to allow aggregation of unrelated claims by a single claimant.

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[46] FED. R. CIV. P. 23(c)(3); *see* note 21 *supra.*

[47] FED. R. CIV. P. 20.

[48] 394 U.S. at 335.

IV. Ancillary Jurisdiction: Zahn v. International Paper Co.

In neither of the two cases consolidated in *Snyder* did an individual plaintiff allege damages of more than $10,000; therefore, the question raised in both was whether the district court had subject matter jurisdiction over the action. The Supreme Court answered this question emphatically in the negative, holding that the separate and distinct claims of the plaintiffs could not be aggregated to satisfy the amount in controversy requirement. *Snyder* clearly restricted the use of the class action in federal courts (except under jurisdictional statutes not requiring a minimum amount in controversy), but it was not known how far reaching this restriction would be. The Court's opinion left at least one important question unanswered: Would the result have been different if one or more, or all, of the representative plaintiffs had individually satisfied the jurisdictional amount? The Supreme Court provided the answer to this question in *Zahn v. International Paper Co.*[49] In this case the Court further restricted the availability of class actions by holding that the jurisdictional amount must be satisfied by *each member* of the class where the claims are not jointly held.

A. *The Decision of the District Court*

The named plaintiffs in *Zahn* were four Vermont landowners whose property fronted on Lake Champlain. On behalf of themselves and approximately two hundred other lakefront property owners, they sought to recover damages from the defendant, a New York corporation, which plaintiffs alleged had seriously polluted the lake with industrial discharges. Jurisdiction was predicated on diversity of citizenship, and the action was brought as a class action under rule 23(b)(3). Each of the named plaintiffs alleged that their property had been damaged by the actions of the defendant in an amount exceeding $10,000. There were no allegations as to the damages sustained by the unnamed members of the class.[50]

Before considering whether the action could be maintained as a class action under rule 23(b)(3), the district court first determined that it had jurisdiction over the claims of the representative plaintiffs because each sought damages in excess of $10,000 and none was a citizen of New York. However, the court felt certain that not every member of the class had a claim for more than $10,000 and thought that *Snyder*

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[49] 94 S. Ct. 505 (1973).

[50] *Id.* at 507.

precluded it from exercising jurisdiction over those unnamed members of the class whose individual claims did not satisfy the amount in controversy requirement.[51] As the district court read *Snyder*, the only class over which it could take jurisdiction would be one comprised of all lakefront property owners having individual damage claims in excess of $10,000. The district judge, exercising his discretion under rule 23(b)(3), refused to allow the class action because of the overriding problems involved in identifying the members of such a class.[52]

B. *The Supreme Court's Opinion*

On interlocutory appeal, the United States Court of Appeals for the Second Circuit affirmed, with one judge dissenting,[53] and the United States Supreme Court granted plaintiffs' petition for a writ of certiorari.[54] The Supreme Court affirmed the judgment of the court of appeals, holding that "[e]ach plaintiff in a rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case . . . ."[55] Justice White, writing for a six-three majority, stated that the Court's prior cases construing the jurisdictional statutes governed the instant case. Citing *Troy Bank v. G. A. Whitehead & Co.*,[56] *Scott v. Frazier*,[57] *Clark v. Paul Gray, Inc.*,[58] and two nineteenth century cases,[59] he repeated the traditional rule that separate and distinct claims of multiple plaintiffs cannot be aggregated to satisfy the jurisdictional amount. Further, the Court was convinced that the *Snyder* rationale was controlling, although it acknowledged that the facts of *Snyder* were distinguishable from those in *Zahn*.[60] Thus it declined to overrule *Snyder* or to re-examine its construction of the "matter in controversy" language in the jurisdictional statutes. As in *Snyder*, the Court referred to congressional re-enactment of the statutes as a bar to a judicial change in the construction.[61]

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[51] 53 F.R.D. at 431-32.

[52] *Id.* at 433.

[53] 469 F.2d 1033 (2d Cir. 1972).

[54] 410 U.S. 925 (1973).

[55] 94 S. Ct. at 512.

[56] 222 U.S. 39, 40-41 (1911).

[57] 253 U.S. 243, 244 (1920).

[58] 306 U.S. 583 (1939).

[59] Stewart v. Dunham, 115 U.S. 61, 64-65 (1885); Bernards Township v. Stebbins, 109 U.S. 341, 355 (1883).

[60] 94 S. Ct. at 511.

[61] *Id.* at 512.

C. *Analysis of Precedents and Rationale Relied Upon by the Court*

The cases relied upon by the Court in reaching its decision do not compel or support the result in *Zahn*. Each presented a different question than the Court dealt with in *Zahn*, and each is distinguishable either on its facts or in its holding, or both. For example, the majority relied heavily on *Clark v. Paul Gray, Inc.*[62] The Court thought that *Clark* was particularly relevant because the Court there had retained jurisdiction over the one claimant who satisfied the jurisdictional amount but had dismissed all the other claims. In contrast, however, all of the representative or named plaintiffs in *Zahn* satisfied the jurisdictional amount—only some of the *unnamed* plaintiffs had not.[63] In *Clark* there is no indication that there even *were* any unnamed plaintiffs. Nor is it clear from the record that *Clark* was in fact brought as a class action,[64] although the Supreme Court treated it as one. Thus *Clark* should have been read merely to hold that the claims of *representative* plaintiffs who are before the court must be dismissed if they do not individually satisfy the jurisdictional amount. *Clark* does not compel similar treatment of the claims of *unnamed* plaintiffs in a class action.[65]

Zahn also relied upon a Second Circuit case, *Hackner v. Guaranty Trust Co.*,[66] which is also distinguishable on its facts from *Zahn*. *Hackner* involved a spurious class action under old rule 23(a)(3). None of the plaintiffs named in the complaint satisfied the jurisdictional amount. When the plaintiffs later attempted to amend the complaint to add the name of a plaintiff who had a claim of sufficient size, the Second Circuit held that adding a plaintiff whose claim would satisfy the jurisdictional

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[62] 306 U.S. 583 (1939). *See also* Troy Bank v. G. A. Whitehead & Co., 222 U.S. 39 (1911) and Scott v. Frazier, 253 U.S. 243 (1920), which were permissive joinder cases and which considered only whether those plaintiffs *appearing before the court* were required to satisfy the jurisdictional amount. Nor is Alvarez v. Pan American Life Insurance Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967), also cited by the Court, compelling authority for the result reached in *Zahn*. None of the representative plaintiffs in *Alvarez* satisfied the jurisdictional amount, so the facts are not analogous to *Zahn*.

[63] The district court was convinced "to a legal certainty" that not every one of the two hundred property owners had suffered damages in excess of $10,000. This would seem to imply that *some* of the unnamed plaintiffs might have suffered damages in that amount. *See* 53 F.R.D. at 431.

[64] It was asserted in *Snyder v. Harris*, 394 U.S. 332, 336-37 (1969), that *Clark* was a class action. However, the *Clark* opinion does not refer to the action as a class action and the opinion of the district court, Paul Gray, Inc. v. Ingels, 23 F. Supp. 946 (S.D. Cal. 1938), gives no indication that the action was brought in a representative capacity. The action was commenced before the Federal Rules of Civil Procedure were adopted. Clark v. Paul Gray, Inc., 306 U.S. 583, 586 n.1 (1939).

[65] The Court's emphasis in *Clark* on "separate and distinct demands" and "each separate controversy," 306 U.S. at 589, renders *Clark* inapplicable to a properly brought 23(b)(3) class action. *See* text accompanying notes 39 to 42 *supra*.

[66] 117 F.2d 95 (2d Cir. 1941).

amount could not confer jurisdiction over the parties.[67] *Hackner*, therefore, dealt with jurisdiction over named plaintiffs with insufficient claims and is on that basis alone distinguishable from *Zahn*. Moreover, the *Hackner* court's reference to "adding a plaintiff" suggests that it may have been concerned about the possibility that named plaintiffs might not be legitimate members or representatives of the class. If this were the basis of the court's decision, then the aggregation doctrine was misapplied. The power to regulate the composition and representation of a class is given to the district judge by rule 23. Thus rule 23, not the aggregation doctrine, would be the proper means of controlling participation in a class action. In *Zahn* there is no indication that any of the named plaintiffs were added to the class to invoke jurisdiction, and, unlike *Hackner*, the named *Zahn* plaintiffs each satisfied the jurisdictional amount requirement. *Hackner* declares only that in a class suit the addition of a plaintiff who satisfies the jurisdictional amount requirement will not confer jurisdiction upon the class when the original named plaintiffs have not satisfied such requirement. The decision does not compel a court to determine whether unnamed members of the class have satisfied the jurisdictional amount when named members have done so.

As in *Snyder*, the Court in *Zahn* declined to re-examine its statutory construction of "matter in controversy" because of Congressional re-enactment of the jurisdictional statutes with the language unchanged. This method of statutory interpretation,[68] however, is even less persuasive in *Zahn* than it was in *Snyder*. The Court in *Snyder* believed that Congress had implicitly enacted the judicial interpretation of "matter in controversy" when it re-enacted the statute "against a background of judicial interpretation that has consistently interpreted that congressionally enacted phrase as not encompassing the aggregation of separate and distinct claims."[69] *Zahn* was the first case in which the Supreme Court considered whether a federal court had jurisdiction over a 23(b)(3) class when each of the named plaintiffs individually satisfied the jurisdictional amount. Therefore, Congress could not possibly have considered and adopted the Court's interpretation of this novel situation when it last re-enacted 28 U.S.C. § 1332 in 1958.

D. *The Distinction Between Named and Unnamed Plaintiffs*

Justice Brennan, in his dissenting opinion in *Zahn*, stated that he would dismiss an insufficient claim of a named plaintiff (as required by

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[67] *Id.* at 97-98.

[68] *See* text accompanying notes 32 and 35-37 *supra.*

[69] 394 U.S. at 339.

Clark), but not of an unnamed plaintiff. It was his opinion that a district court had jurisdiction to hear the claims of all the members of a class if each of the representative plaintiffs satisfied the jurisdictional amount requirement. This position was challenged by the majority,[70] which could find no justification for exempting unnamed plaintiffs from the jurisdictional amount requirement if named plaintiffs were bound by it. The Court's refusal to recognize a distinction between named and unnamed plaintiffs is curious, since it has previously endorsed such a distinction in resolving diversity of citizenship questions.

It is generally held that a federal court does not have jurisdiction in a diversity case if any plaintiff is a citizen of the same state as any defendant.[71] But in *Supreme Tribe of Ben Hur v. Cauble*,[72] the Court distinguished between named plaintiffs and the unnamed members of the plaintiff class on the issue of diversity of citizenship. It held that the diversity requirement was satisfied, and the district court had jurisdiction, as long as the *named* plaintiffs in the class were citizens of states other than that of the defendant. This was true even though some unnamed members of the class were citizens of the same state as the defendant. Furthermore, the court's jurisdiction would not be destroyed even by intervention of the non-diverse unnamed members of the class. Allowing the unnamed plaintiffs to sue in the federal courts of their own state, either by intervention or by virtue of the binding effect of the court's decree, is clearly an exemption from the statutory diversity of citizenship requirements. No explanation is given by the majority in *Zahn* why the *Ben-Hur* approach would not be equally suitable for the matter in controversy issue.

E. *Ancillary Jurisdiction*

The Court in *Zahn* stated that there was "no doubt"[73] that the rationale of *Snyder* controlled *Zahn*. But *Snyder* was concerned with the question whether the district court had jurisdiction over the "action," and the Court there relied on a series of aggregation cases to conclude that it did not. In *Zahn*, however, the Court had already determined that it *had* subject matter jurisdiction; its main inquiry was directed at defining the permissible extent of its jurisdiction. This is a question that can be answered by reference to considerations wholly unrelated to the doc-

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[70] 94 S. Ct. at 511 n.9.

[71] Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806).

[72] 255 U.S. 356 (1921).

[73] 94 S. Ct. at 511.

trine of aggregation. Therefore, it is submitted that *Snyder* does not compel the result reached by the Court in *Zahn*.

The *Zahn* majority seems to have regarded the case as one that turned on the aggregation issue, for it relied on a series of aggregation decisions to reach its conclusion. However, since the crucial issue was the extent of jurisdiction over claims of the various plaintiffs in the class, an alternative approach was available to the Court which would have *permitted* entertainment of the unnamed plaintiff's claims, but which would not have made entertainment mandatory. Under the doctrine of *ancillary jurisdiction* the district court, in its discretion, could have adjudicated the claims of the unnamed class members on the basis of ancillary jurisdiction. This would have furthered the policy underlying amended rule 23 by helping the small claimant to obtain redress for his injuries.

The concept of ancillary jurisdiction, cited by the dissent in *Zahn*, but completely ignored by the majority,[74] can be stated simply: When a federal court properly has subject matter jurisdiction over a case or controversy, it can properly exercise jurisdiction over related claims. In *United Mine Workers v. Gibbs*,[75] the Supreme Court recognized the power of a federal court to adjudicate pendent or ancillary claims without independent grounds of jurisdiction. In *United Mine Workers*, the plaintiff had asserted a federal claim, establishing jurisdiction over the "case." The Court held this empowered the district court to adjudicate a companion state claim by means of pendent jurisdiction, even though there was no independent basis for federal jurisdiction over the state claim. The Court established the requirement that the plaintiff's claims be such "that he would ordinarily be expected to try them all in one judicial proceeding,"[76] and that the claims "derive from a common nucleus of operative fact."[77]

This policy of "resolving all issues involved in the subject matter before the court"[78] and of avoiding piecemeal litigation should be equally applicable in the case of class actions. Claims which did not independently satisfy the jurisdictional amount could be regarded as ancillary

[74] The district judge felt bound by *Snyder*, but acknowledged that the ancillary jurisdiction concept was an attractive idea that could be the basis of jurisdiction. Judge Timbers of the Second Circuit, dissenting, vigorously argued that the insufficient claims should be within the ancillary jurisdiction of the court. Finally, Justice Brennan, joined in his dissent by Justices Douglas and Marshall, argued that the district court could, within its discretion, have properly exercised ancillary jurisdiction over all the insufficient claims.

[75] 383 U.S. 715 (1966).

[76] 383 U.S. at 725.

[77] *Id.*

[78] Note, *Federal Practice: Jurisdiction of Third Party Claims*, 11 OKLA. L. REV. 326, 329 (1958).

to the claims which invoke the jurisdiction of the court. The Supreme Court in *Ben-Hur*, for instance, permitted the exercise of ancillary jurisdiction over related claims not having an independent basis of federal jurisdiction.[79] More recently some lower federal courts have exercised ancillary jurisdiction over claims asserted by parties joined under rule 20 when such claims did not have independent jurisdictional grounds.[80] Unquestionably the claims of all members of the class in *Zahn* "derive from a common nucleus of operative fact," since they all assert that the same actions of the defendant caused them injury. Further, if the district court found, in accordance with rule 23, that class treatment was appropriate, this should be persuasive that the claims of the members of the class were such that they would ordinarily be expected to try them in a single judicial proceeding. The district court, in its discretion, could have asserted ancillary jurisdiction over the claims of the unnamed plaintiffs whom the court believed did not independently satisfy the jurisdictional amount requirement.

It could not properly be asserted that adjudicating related claims on the basis of ancillary jurisdiction would always promote the goal of judicial economy. Thus jurisdiction should not be automatically assumed. The court has discretion to dismiss or entertain ancillary claims, and if the ancillary claims would be overly burdensome because of many individual questions not common to all the claims, then the district judge should refuse to allow the action to proceed as a class action under rule 23(b)(3).[81] But the majority in *Zahn* did not even mention the possibility of discretionary exercise of ancillary jurisdiction. The implication is that the court does not intend that class action restrictions can be circumvented by the doctrine of ancillary jurisdiction.

V. THE RULE 23 (B)(3) CLASS ACTION AFTER ZAHN V. INTERNATIONAL PAPER CO.

A. *General Implications of Zahn*

It has frequently been stated by courts and commentators that one of the major purposes of rule 23 is to provide a device for litigating a large number of small but related claims.[82] The costs of litigation

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[79] *See* text accompanying notes 71-72 *supra.*

[80] *See, e.g.*, General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967). In neither case did the claims of the joined parties exceed $10,000.

[81] The judge must find that common questions predominate over individual questions not common to the class before class action treatment can be permitted. FED. R. CIV. P. 23(b)(3).

[82] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968); Escott v. Barchris Construction Corp., 340 F.2d 731 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Dolgow

and counsel can be prohibitive when only a small amount of damages is sought. Sharing such costs is essential to the claimant whose potential recovery is small but whose claim requires sophisticated scientific proof. Moreover, when a group of small claims represents a substantial amount of money, it is easier to attract superior counsel.

Under old rule 23, unnamed members of the class were required to intervene if they desired to be included in the rule 23(a)(3) class action judgment. This requirement of affirmative action has been eliminated in the amended rule; now the claimant only need act if he wants to be excluded from the judgment. Since a person with a small claim would probably be the least likely to involve himself in a legal proceeding, it has been asserted that elimination of the intervention requirement is convincing evidence that the dominant motive of the revising of rule 23 was to make it easier for the small claimant to obtain redress for his injury.[83]

After the Supreme Court's decisions in *Snyder* and *Zahn*, relief can be obtained by small claimants in the federal courts only if jurisdiction can be based on a statute not requiring a jurisdictional amount or if the class can convince the court that the rights sought to be enforced are joint or common.[84] Thus many class actions in the federal courts are precluded by these cases, and many smaller claims will probably go unredressed.

The litigation costs to the defendant in *Zahn* could clearly have been minimized if all the claims against it could have been adjudicated in the same proceeding. However, the *Zahn* defendant opposed the use of a class action, apparently on the conviction that denial of a class action would result in some of the smaller claimants not being able to proceed with their claims at all for financial reasons. While many states permit some kind of class action, most are not as effective a procedural tool as the federal class action.[85] The *Zahn* rule therefore presents a defendant with a significant procedural advantage.

There are other problems created by the *Zahn* decision. In *Zahn* the named plaintiffs had already indicated a preference to try their cases

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v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1756 (1972); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Kaplan, *A Prefatory Note to the Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969).

[83] Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 507 (1969).

[84] The Court noted in *Zahn* that its decision would apply as well when jurisdiction was based on 28 U.S.C. 1331. 94 S. Ct. at 512 n.11.

[85] *See* Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U. L. REV. 407, 469 (1969).

in federal court, as is their right under the jurisdictional statute. Others could possibly have sought relief in the courts of Vermont, either as a class or individually. But this would have created a risk of inconsistent adjudications and while the federal court must apply state law to the dispute,[86] if there is no applicable state precedent the federal court must decide the case as they think it would be decided by the highest state court.[87] The state courts subsequently could reach a different result with respect to another member of the class. The opportunity to adjudicate all the claims of the class in a single proceeding in federal court would help to eliminate the possibility of such inconsistency. A single state proceeding would achieve the same consistency but, with federal diversity jurisdiction available, some of those who meet the requirements might prefer to litigate their claims in federal court. Thus no one proceeding would ever determine the rights of all interested persons. In addition to increased costs to all parties, the multiple litigation caused by *Zahn* results in an uneconomical use of judicial resources—the fragmenting of the litigation will probably require that the alleged wrongdoing of the defendant be proved many times over.

B. *Impact on Environmental Litigation*

The complaint in *Zahn* was based on claims arising under state law. Today such a complaint would probably state a federal cause of action[88] and jurisdiction could be based on 28 U.S.C. § 1331, the general federal question statute. While this would not have caused a different result in *Zahn*, since § 1331 has the same jurisdictional amount requirement as § 1332,[89] it may make a difference in the future. The American Law Institute has recommended that the minimum jurisdictional amount requirement be eliminated from the general federal question jurisdictional statute.[90] While the Institute would retain the minimum amount requirement for diversity jurisdiction, it recommends that § 1331 be brought in line with the special federal question jurisdictional statutes in order to provide a federal forum for all claims based on federal law. Since an environmental pollution claim may now be brought as a federal

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[86] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[87] Certification to a state court for resolution of the controlling questions of law might, of course, be available in some situations.

[88] *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1962) (federal cause of action for pollution of interstate waterway).

[89] *See* note 84, *supra.*

[90] *See* THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION BETWEEN STATE AND FEDERAL COURTS (Washington, D.C. 1965, 1968).

cause of an action,[91] the A.L.I.'s proposed change in the jurisdictional statute would be extremely beneficial to environmental litigants. Because of *Zahn*, the jurisdictional amount requirements present virtually insurmountable obstacles to a class action seeking damages. It is highly unlikely that many classes will be found for such cases in which every member will have suffered $10,000 worth of damages, and the difficulties of identifying a class based on amount of damages would probably outweigh the advantages of the class action.

Environmental issues have become emotionally charged in recent years, and public opinion has been aroused. The class action has been said to be similar to a mass street demonstration because it is an effective means of bringing the litigants' problem or cause to the attention of the public.[92] The proposed change in § 1331, by circumventing the obstacles presently raised by the *Zahn* decision, would greatly assist environmentalists in eliciting public support for environmental issues.

C. *Potential Effect on the Consumer Movement*

Although *Zahn* dealt with claims relating to pollution of the environment, the decision was a blow to the consumer movement as well. Attempts to bring class actions on behalf of large numbers of consumers have encountered difficulties unrelated to the amount in controversy. Some courts have held that classes of thousands or even millions of consumers would be unmanageable and have denied class action treatment on that basis.[93] Today, if federal jurisdiction must be based on diversity of citizenship or on a general federal question, *Snyder* and *Zahn* stand as a complete bar to a class action for damages. The injured consumer is likely to have a monetary claim which could not justify the cost of individual litigation. A merchant or manufacturer who has wrongfully injured a large number of consumers should not be allowed to escape responsibility because the legal system is too expensive to be used by the consumers individually. The class action is an effective remedy. As with environmental causes, the consumer movement requires mobilization of public opinion, and this makes the class action, which attracts public attention, a vital tool.

VI. CONCLUSION

The decisions of the Supreme Court in *Snyder v. Harris* and *Zahn*

[91] *See* note 89 *supra.*

[92] Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 408 (1969).

[93] *See, e.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73-74 (D. N.J. 1971); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 321 (S.D.N.Y. 1970).

v. International Paper Co. were not compelled by statute or precedent. The opposite results would have been analytically supportable and would have promoted the goals of class actions—specifically, judicial economy and redress of multiple small claims. At this point the only escape from *Snyder* and *Zahn* under §§ 1331 and 1332 is to structure the action in such a way that the district court can find that the rights asserted are joint or common. A judge sympathetic to the goals of class actions may give the plaintiffs the benefit of the doubt in a close case, but in view of the Supreme Court's unsympathetic reception of class actions, substantial relief can be guaranteed only by legislation. As noted above,[94] the proposed elimination of the matter in controversy requirement in general federal question cases would be of substantial help in some areas. With respect to diversity jurisdiction, Congress should specifically authorize either aggregation or ancillary jurisdiction or both in rule 23(b)(3) class actions, but raise the minimum jurisdictional amount required for such actions to, perhaps, $100,000. This would insure that the federal courts continue to devote their time to "substantial controversies."

Edward S. Ginsburg

[94] *See* text accompanying note 91 *supra.*